

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SAMUELLA CADWELL and ALBERT D. CADWELL,

Plaintiff,

-vs-

NOTICE OF CROSS-MOTION

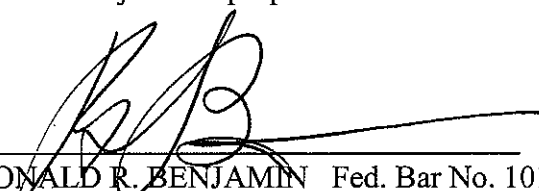
Case No. 08-Civ-3068

MERCK & CO., INC.,

Defendant.

PLEASE TAKE NOTICE that upon the attorney affirmation of Ronald R. Benjamin, dated the 10th day of April, 2008, and the Defendant's Notice of Removal and exhibits, and the accompanying Memorandum of Law, dated April 10, 2008, and upon all the pleadings and prior proceedings heretofore had, served and/or filed herein, plaintiff will cross-move this Court, before the Honorable George B. Daniels at a date to be set by the Court, in the United States Courthouse for the Southern District of New York, for an order pursuant to 28 U.S.C. §1447(c) remanding this action back to the New York State Supreme Court for the County of New York from which it was improperly removed by defendant Merck & Co., Inc., on the grounds of alleged fraudulent joinder and other allegations of tactically avoiding removal, and will seek such other and further relief as is just and proper.

Dated: April 10, 2008
Binghamton, New York



RONALD R. BENJAMIN Fed. Bar No. 101131
LAW OFFICE OF RONALD R. BENJAMIN
Attorneys for Plaintiff
126 Riverside Drive, P. O. Box 607
Binghamton, New York 13902
607/772-1442

TO: Theodore V. H. Mayer, Esq.
Vilia B. Hayes, Esq.
Robb W. Patryk, Esq.
HUGHES HUBBARD & REED LLP
Attorneys for Defendant Merck & Co., Inc.
One Battery Park Plaza
New York, New York 10004-1482

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SAMUELLA CADWELL and ALBERT D. CADWELL,

Plaintiff,

ATTORNEY AFFIRMATION

-vs-

Case No. 08-Civ-3068

MERCK & CO., INC.,

Defendant.

STATE OF NEW YORK)
) ss:
COUNTY OF BROOME)

RONALD R. BENJAMIN, an attorney duly admitted to practice in the State of New York,
hereby affirms under penalty of perjury as follows:

1. I am the attorney for the plaintiff and make this affirmation in support of plaintiff's
opposition to the defendant's motion to stay the proceedings pending a decision on transfer by the
Judicial Panel on Multi-District Litigation.

2. This affirmation further supports the plaintiff's instant cross-motion to remand this action
back to the New York State Supreme Court for the County of New York from which it was removed
by defendant Merck & Co., Inc., on the grounds of alleged tactical avoidance of removal, which
appears to also suggest fraudulent joinder.

3. Plaintiff was originally named in the caption of a multi-plaintiff action filed on May 11,
2005, in the Supreme Court of the State of New York for the County of New York, entitled Samuella
Cadwell and Albert D. Cadwell, Wilbert E. Corprew, et ux. Carol Corprew, Elsa Plocek, et ux. Marian
Plocek, and Ronald H. Schaffer, et ux. Beverly Schaffer v. Pfizer, Inc., Pharmacia Corporation, a wholly-
owned subsidiary of Pfizer, Inc., and Pharmacia & Upjohn Company, a wholly-owned subsidiary of
Pharmacia Corporation, and Merck & Co., Index No. 106547/05, as confirmed by Merck's

Acknowledgment of Service, annexed hereto as **Exhibit A**.

4. By Administrative Order dated April 14, 2006, all cases seeking damages for ingestion of Bextra, Celebrex and Vioxx, whether alone or in combination, were assigned to the Hon. Shirley W. Kornreich for the purpose of coordination for all purposes. *See Administrative Order, annexed as last document in Merck's Ex.4., at page 1.*

5. As Merck appears to concede in its moving papers, it did not seek to remove the original complaint during the one-year period after it was filed, nor the separate complaint during the one-year period after it was filed.

6. On its face, the complaint alleges product liability and fraud claims against defendant Merck & Co., as well as Pfizer, Inc., arising out of the plaintiff's ingestion of their respective drugs Vioxx and Celebrex. *Id., at paras. 15-16.* It is clear from the complaint that plaintiff alleged indivisible injury based on the same personal injury risks posed by these two drugs.

7. The complaint alleges that, "starting in or about 1999 and continuing thereafter at various times, injured plaintiff SAMUELLA CADWELL ingested the drugs Vioxx and Celebrex as directed by her physicians and in accordance with the respective manufacturer's instructions." *Complaint, Merck Ex. 1, at para. 15.*

8. The complaint further alleges that, "starting in or about 1999 and continuing thereafter at various times, injured plaintiff ARTHUR D. CADWELL ingested the drugs Vioxx and Celebrex as directed by her physicians and in accordance with the respective manufacturer's instructions."

9. The plaintiffs' prescriptions were for Celebrex at the 200 mg daily dose, as documented in their medical records. *See copies of pharmacy records annexed hereto as Exhibit B.*

10. On the face of the original multi-plaintiff complaint and the instant separate action complaint, it is clear plaintiffs did not sue any physician, salesman distributor or fictitious John Doe;

rather, they confirm they sued as co-defendants only the manufacturers of the other Cox-II inhibitor drugs (Celebrex) plaintiffs ingested, manufactured and marketed by Merck's competitor, Pfizer

11. Further, the complaints allege both the plaintiffs and defendant Pfizer are citizens of the State of New York (*Notice of Removal, at para. 5*), and defendant's removal papers do not in any respect indicate there is any evidence that defendant Pfizer is not a citizen of New York State as alleged in the complaint at the time of filing. Instead, defendant Merck appears to concede diversity of citizenship was not a basis for federal jurisdiction in this case at the time either the original or amended complaint was filed, and claims the Stipulation that discontinued plaintiffs' claims against its co-defendant Pfizer almost three years later was some kind of "tactical avoidance."

12. Merck is or should be fully aware there is ongoing nationwide litigation against the Pfizer defendants, as well as multidistrict litigation, and that on November 19, 2007, the Honorable Charles R. Breyer issued an opinion holding that the "plaintiffs have not presented scientifically reliable evidence that Celebrex causes heart attacks or strokes when ingested at the 200 milligram a day dose." IN RE: BEXTRA AND CELEBREX MARKETING SALES PRACTICES AND PRODUCT LIABILITY LITIGATION (MDL No. 1699), 524 F. Supp. 2d 1166, 1169, 2007 U.S. Dist. LEXIS 85382 at *40 (N.D.CA 2007).

13. Judge Breyer's order came within days after the Compliance Motion Order entered by Special Master Fern M. Smith cited by Merck, which required expedited compliance with discovery requirements of Case Management Order No. 6 within 21 days. *See Merck's Ex. 4 annexed to the Notice of Removal*. However, it is clear Judge Breyer's decision intervened and had a clear impact on the viability of each plaintiff's claims based on ingestion of Celebrex 200 mg.

14. Indeed, thereafter, Pfizer filed a motion for failure to comply with Judge Smith's expedited order, and it was not until March 5, 2008, that plaintiff's counsel signed the Stipulation of


Dismissal with Prejudice Against Pfizer Defendants. *See Stipulation annexed as Ex. 2 to Notice of Remand.*

15. However, it is significant that, on February 25, 2008, prior to executing the Stipulation, counsel for plaintiff filed a cross-motion for an extension of time based on the fact that "Judge Breyer's decision and the overlapping events...have clearly raised significant issues as to the likelihood of success of each of the plaintiff's claims [based on Celebrex]" which required him to evaluate the individual claims and identify claims that should be discontinued and advise the plaintiffs of the same. *See annexed hereto as Exhibit D, Attorney Affirmation (without exhibit) in support of cross-motion, at paras. 6-7.*

16. In view of the aforesaid matters confirming there was no fraudulent joinder or tactical avoidance that supports removal beyond the one-year period, it is respectfully requested this Court should DENY the defendant's motion for a stay since the rules provide plaintiff thirty days within which to file a motion to remand, and this Court is the only court that currently has jurisdiction over this case.

17. Moreover, this Court should GRANT the plaintiff's cross-motion to remand this action to the New York State Supreme Court for the County of New York, in the coordinated litigation before Judge Kornreich which will obviate the transfer of this case and be in the interests of judicial economy.

Dated: April 10, 2008
Binghamton, New York



RONALD R. BENJAMIN Fed.Bar No. 101131
LAW OFFICE OF RONALD R. BENJAMIN
Attorneys for Plaintiff
126 Riverside Drive, P. O. Box 607
Binghamton, New York 13902
607/772-1442

Exhibit

A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X-----
SAMUELLA D. CADWELL and ALBERT D
CADWELL, WILBERT E. CORPREW, et ux.
CAROL CORPREW, ELSA PLOCEK, et ux.
MARIAN PLOCEK, and RONALD H. SCHAFER,
et ux. BEVERLY SCHAFER,

Plaintiff,

ACKNOWLEDGMENT OF RECEIPT BY MAIL
OF SUMMONS AND COMPLAINT
Index No.: 106547-05
Date Filed: May 11, 2005

- against -

PFIZER, INC., PHARMACIA CORPORATION, a
wholly-owned subsidiary of PFIZER INC.,
PHARMACIA & UPJOHN COMPANY, a wholly-
owned subsidiary of PHARMACIA CORPORATION,
and MERCK & CO., INC

Defendants.

-----X-----
TO: Merck & Co., Inc.
One Merck Drive
P.O. Box 100 WS3AB-05
Whitehouse Station, New Jersey 08889-0100

I received a summons and complaint in the above captioned matter at _____

Please check one of the following:

1. ☒ I am not in the military service.
2. ☐ I am in the military service, and my rank, serial number and branch of service are as follows:

Rank: _____

Serial Number: _____

Branch: _____

TO BE COMPLETED REGARDLESS OF MILITARY STATUS:

Date: _____
(Date this Acknowledgment is executed)

I affirm the above as true/under penalty of perjury.

Signature: Velia B Hayes

Print Name: VELIA B. HAYES

Address: Hughes Hubbard + Reed LLP

One Battery Park Plaza, NY, NY 10004

Name of Defendant for which acting: Merck & Co., Inc.

Position with Defendant for which acting (i.e., officer, attorney etc.)

PLEASE COMPLETE ALL BLANKS INCLUDING DATES

Exhibit

B

P A T I E N T H I S T O R Y

12-Feb-05

Date Range: 01/01/99 TO 02/11/05
 Drug Class Range: TO

SAMUELLA CADWELL
 583 KENT ST.
 WINDSOR NY 13865
 (607) 655-1137
 Birthdate: 08/15/43 Sex: F
 Social Security No:

ECKERD DRUGS #5088
 67-71 ROBINSON STREET
 BINGHAMTON NY 13901
 License # 015233

Ref.	Date	Rx No.	No.	Drug Name	Unit	NDC	Dispensed	Day	Qty	Sup	Doctor Name	Init.	Third Party	Authorization	Patient
															Pays
	01/22/99	6954926	00	LIPITOR 10MG TABS	TA	00071-0155-23	30.000	30	Dr. BOYLE	MP	46364380	MP	46364380		20.00
	01/22/99	6954927	00	PRIOSEC 20MG CAPS*30	CA	61113-0742-31	30.000	30	Dr. BOYLE	MP	46245380	MP	46245380		20.00
	01/22/99	6954928	00	PREMPRO 2.5MG TAB-28	TA	00046-0875-06	28.000	28	Dr. BOYLE	MP	46784380	MP	46784380		20.00
	02/16/99	6958144	00	ULTRAM 50MG TAB	TA	00045-0659-70	50.000	12	Dr. BOYLE	DS	47671039	DS	47671039		20.00
	02/17/99	6958400	00	SMZ-TMP DS TABS	TA	00093-0089-05	20.000	10	Dr. BOYLE	SLB	47367054	SLB	47367054		5.00
	02/17/99	6958399	00	METRONIDAZOLE 500MG TAB	TA	00172-3007-48	40.000	10	Dr. BOYLE	SLB	47729054	SLB	47729054		5.00
	02/24/99	6954927	01	PRIOSEC 20MG CAPS*30	CA	61113-0742-31	30.000	30	Dr. BOYLE	AND	47760911	AND	47760911		20.00
	02/24/99	6954926	01	LIPITOR 10MG TABS	TA	00071-0155-23	30.000	30	Dr. BOYLE	AND	47880911	AND	47880911		20.00
	02/24/99	6954928	01	PREMPRO 2.5MG TAB-28	TA	00046-0875-06	28.000	28	Dr. BOYLE	AND	47905911	AND	47905911		20.00
	02/24/99	6954928	04	PREMPRO 2.5MG TAB-28	TA	00046-0875-06	28.000	28	Dr. BOYLE	AND	47901366	AND	47901366		20.00
	04/05/99	6954927	02	PRIOSEC 20MG CAPS*30	CA	61113-0742-31	30.000	30	Dr. BOYLE	MEC	47610994	MEC	47610994		20.00
	04/05/99	6954926	02	LIPITOR 10MG TABS	TA	00071-0155-23	30.000	30	Dr. BOYLE	MEC	47305994	MEC	47305994		20.00
	04/19/99	6941380	05	PREMPRO 2.5MG TAB-28	TA	00046-0875-06	28.000	28	Dr. BOYLE	DS	47196642	DS	47196642		20.00
	05/05/99	6941381	04	PRIOSEC 20MG CAPS*30	CA	61113-0742-31	30.000	30	Dr. BOYLE	DS	99125782600001	DS	99125782600001		20.00
	05/05/99	6941379	04	LIPITOR 10MG TABS	TA	00071-0155-23	30.000	30	Dr. BOYLE	DS	99125782420001	DS	99125782420001		20.00
	05/19/99	6954928	02	PREMPRO 2.5MG TAB-28	TA	00046-0875-06	28.000	28	Dr. BOYLE	AND	9913972700001	AND	9913972700001		20.00
	05/25/99	6970587	00	CELEBREX 200MG CAPS	CA	00025-1525-31	30.000	30	Dr. BOYLE	AND					77.19
	06/06/99	6941381	05	PRIOSEC 20MG CAPS	CA	00186-0742-31	30.000	30	Dr. BOYLE	DS	99157715360001	DS	99157715360001		20.00
	06/06/99	6941379	05	LIPITOR 10MG TABS	TA	00071-0155-23	30.000	30	Dr. BOYLE	DS	99157897780001	DS	99157897780001		20.00
	06/15/99	6973122	00	PREMPRO 2.5MG TAB-28	TA	00046-0875-06	28.000	28	Dr. BOYLE	MP	99166905710001	MP	99166905710001		20.00
	06/23/99	3974063	00	HYDROCODONE/APAP 5/500TA	TA	00406-0357-05	40.000	7	Dr. KAMMERMAN	MP	99174607620001	MP	99174607620001		4.46
	07/05/99	6975284	00	LIPITOR 10MG TABS	GM	00071-0155-23	30.000	30	Dr. BOYLE	DS	99186795770001	DS	99186795770001		20.00
	07/05/99	6975283	00	ELOCON CR	GM	00085-0567-01	15.000	5	Dr. STUBBS	DS	99186795880001	DS	99186795880001		19.73
	07/05/99	6975286	00	PRIOSEC 10MG CAPS	CA	00186-0606-31	30.000	30	Dr. BOYLE	DS	99186795880001	DS	99186795880001		20.00
	07/15/99	6975285	00	PREMPRO 2.5MG TAB-28	TA	00046-0875-06	28.000	28	Dr. BOYLE	MP	99196779960001	MP	99196779960001		20.00
	08/10/99	6975284	01	LIPITOR 10MG TABS	TA	00071-0155-23	30.000	30	Dr. BOYLE	MEC	99222693190001	MEC	99222693190001		20.00
	08/10/99	6975286	01	PRIOSEC 10MG CAPS	CA	00186-0606-31	30.000	30	Dr. BOYLE	MEC	99222693080001	MEC	99222693080001		20.00
	08/10/99	6975285	01	PREMPRO 2.5MG TAB-28	TA	00046-0875-06	28.000	28	Dr. BOYLE	MEC	99222693160001	MEC	99222693160001		20.00
	09/07/99	6975285	02	PREMPRO 2.5MG TAB-28	TA	00046-0875-06	28.000	28	Dr. BOYLE	MEC	99250703590001	MEC	99250703590001		20.00
	09/07/99	6975286	02	PRIOSEC 10MG CAPS	CA	00186-0606-31	30.000	30	Dr. BOYLE	MEC	99250629030001	MEC	99250629030001		20.00
	09/07/99	6975284	02	LIPITOR 10MG TABS	TA	00071-0155-23	30.000	30	Dr. BOYLE	MEC	99250960550001	MEC	99250960550001		20.00
	10/08/99	6975286	03	PRIOSEC 10MG CAPS	CA	00186-0606-31	30.000	30	Dr. BOYLE	DS	92812567920001	DS	92812567920001		20.00
	10/08/99	6975285	03	PREMPRO 2.5MG TAB-28	TA	00046-0875-06	28.000	28	Dr. BOYLE	DS	92812567920001	DS	92812567920001		20.00
	10/08/99	6975284	03	LIPITOR 10MG TABS	TA	00071-0155-23	30.000	30	Dr. BOYLE	DS	92812568020001	DS	92812568020001		20.00
	11/09/99	6975286	04	PRIOSEC 10MG CAPS	CA	00186-0606-31	30.000	30	Dr. BOYLE	SL	93139941560001	SL	93139941560001		20.00
	11/09/99	6975285	04	PREMPRO 2.5MG TAB-28	TA	00046-0875-06	28.000	28	Dr. BOYLE	SL	93139941560001	SL	93139941560001		20.00
	11/09/99	6975284	04	LIPITOR 10MG TABS	TA	00071-0155-23	30.000	30	Dr. BOYLE	SL	93130439350001	SL	93130439350001		20.00
	12/03/99	6993097	00	ARTHROTEC 50MG TABS	TA	00025-1411-60	60.000	20	Dr. KAMMERMAN	VA	93375415670001	VA	93375415670001		20.00
	12/07/99	6975285	05	PREMPRO 2.5MG TAB-28	TA	00046-0875-06	28.000	28	Dr. BOYLE	MEC	93410235230001	MEC	93410235230001		20.00
	12/07/99	6975284	05	LIPITOR 10MG TABS	TA	00071-0155-23	30.000	30	Dr. BOYLE	MEC	93412230300001	MEC	93412230300001		20.00
	12/07/99	6975286	05	PRIOSEC 10MG CAPS	CA	00186-0606-31	30.000	30	Dr. BOYLE	MEC	93413240860001	MEC	93413240860001		20.00
	12/27/99	6995488	00	PRIOSEC 20MG CAPS	CA	00186-0742-31	30.000	30	Dr. BOYLE	DS	93615331730001	DS	93615331730001		20.00
	12/27/99	6995487	00	VIOXX 12.5MG TAB	TA	00006-0074-68	60.000	30	Dr. BOYLE	MP	93611317860001	MP	93611317860001		20.00

Exhibit

C

P A T I E N T H I S T O R Y

Date Range: 01/01/99 TO 02/11/05
Drug Class Range:

ECKERD DRUGS #5088
67-71 ROBINSON STREET
BINGHAMTON NY 13901
License # 015233

ALBERT CADWELL
583 KENT ST.
Windsor NY 13865
(607) 655-1137
Birthdate: 02/28/40 Sex: M
Social Security No: 061324463

Date	Rx No.	No.	Drug Name	Ref.	Unit NDC	Qty	Sup	Doctor Name	Init.	Authorization	Patient Pays
01/13/99	6934706	03	ZOCOR 5MG TAB		TA 00066-0726-61	30.000	30	DR. BOYLE	DS	48815272	20.00
01/13/99	6934707	05	NORVASC 10MG TAB		TA 00069-1540-68	30.000	30	DR. BOYLE	DS	46162272	20.00
01/13/99	6934708	05	LOTENSIN 20MG TABS		TA 00083-0079-30	30.000	30	DR. BOYLE	DS	46180272	20.00
02/08/99	6957084	00	AMOXICILLIN 500MG CAPS		CA 00093-3109-05	30.000	7	DR. FARRELL	DS	46059954	5.00
02/08/99	3957063	00	HYDROCODONE/APAP 10/660		TA 00406-0362-01	15.000	2	DR. FARRELL	DS	46535954	5.00
02/10/99	3957083	01	HYDROCODONE/APAP 10/660		TA 00406-0362-01	15.000	2	DR. FARRELL	MP	46581799	5.00
02/15/99	6957946	00	NORVASC 10MG TAB		TA 00069-1540-68	30.000	30	DR. DIMENNA	MP	47164024	20.00
02/15/99	6957946	00	LOTENSIN 20MG TABS		TA 00083-0079-30	30.000	30	DR. DIMENNA	MP	47266024	20.00
03/04/99	6960488	00	AXID 150MG PULV		CA 00002-3144-60	30.000	15	DR. Young	MP	1-1075417	.00
03/04/99	6960488	00	DELTAONE 20MG TABS		TA 00009-0185-01	30.000	15	DR. Young	MP	1-1075422	.00
03/04/99	6960488	00	DIFLUNISAL 500MG TABS		TA 00093-0755-01	60.000	30	DR. Young	MP	1-1075424	.00
03/12/99	6961524	00	AXID 150MG PULV		CA 00002-3144-60	60.000	30	DR. BOYLE	AND		.00
03/12/99	6961524	00	DIFLUNISAL 500MG TABS		TA 00093-0755-01	60.000	30	DR. BOYLE	AND		.00
03/12/99	6961526	00	PREDNISONE 10MG TABS		TA 00364-0461-02	50.000	21	DR. BOYLE	AND		.00
03/22/99	6957945	01	NORVASC 10MG TAB		TA 00069-1540-68	30.000	30	DR. DIMENNA	AND	47020366	20.00
04/05/99	6957946	01	LOTENSIN 20MG TABS		TA 00083-0079-30	30.000	30	DR. DIMENNA	MEC	47075994	20.00
04/14/99	6965462	00	COLESTID 1GM TABS		TA 00009-0450-03	60.000	30	DR. BOYLE	DS	47214659	20.00
04/19/99	6961524	01	AXID 150MG PULV		CA 00002-3144-60	60.000	30	DR. BOYLE	DS	1-1080096	.00
04/19/99	6961524	01	DIFLUNISAL 500MG TABS		TA 00093-0755-01	60.000	30	DR. BOYLE	DS	1-1080098	.00
04/26/99	6957945	02	NORVASC 10MG TAB		TA 00069-1540-68	30.000	5	DR. GIANNONE	MP	99116657600001	2.97
04/29/99	6967410	00	DESOXIMETASONE 0.25% CM		CM 51672-1270-01	30.000	5	DR. BOYLE	MP	99116777560001	20.00
04/30/99	6966979	01	HYDROXYZINE HCL 25MG TB		TA 50111-0308-03	20.000	5	DR. GIANNONE	DS	99119726290001	5.00
05/03/99	6957946	02	LOTENSIN 20MG TABS		TA 00083-0079-30	30.000	30	DR. DIMENNA	DS	99120594730001	2.97
05/04/99	6966979	02	HYDROXYZINE HCL 25MG TB		TA 50111-0308-03	20.000	5	DR. GIANNONE	AND	99123993270001	20.00
05/13/99	6967410	01	DESOXIMETASONE 0.25% CM		CM 51672-1270-01	30.000	5	DR. GIANNONE	DS	99124741260001	2.97
05/20/99	6970002	00	TRICOR 67MG		CA 00074-4342-90	30.000	5	DR. BOYLE	AND	99133552770001	5.00
05/24/99	6957945	03	NORVASC 10MG TAB		TA 00069-1540-68	30.000	30	DR. BOYLE	AND	99140750990001	20.00
05/27/99	6957946	03	LOTENSIN 20MG TABS		TA 00083-0079-30	30.000	30	DR. DIMENNA	DS	99144774090001	20.00
06/16/99	6973154	00	ULTRAM 50MG TAB		TA 00045-0659-70	100.000	25	DR. BOYLE	MP	99147777700001	20.00
06/17/99	6970002	01	TRICOR 67MG		CA 00074-4342-90	30.000	15	DR. BOYLE	MP	1-1159612	.00
06/18/99	4973468	00	AMBIEN 10MG TABS		TA 00025-5421-31	30.000	30	DR. BOYLE	MP	1-1159605	.00
06/24/99	6957945	04	NORVASC 10MG TAB		TA 00069-1540-68	30.000	30	DR. BOYLE	DS	99168664390001	20.00
07/04/99	6957946	04	LOTENSIN 20MG TABS		TA 00083-0079-30	30.000	30	DR. DIMENNA	AND	99175573630001	20.00
07/15/99	6976509	00	TRICOR 67MG		CA 00074-4342-90	60.000	15	DR. BOYLE	MP	99185673150001	20.00
07/19/99	4973468	01	AMBIEN 10MG TABS		TA 00025-5421-31	30.000	30	DR. BOYLE	MP	1-1188271	.00
07/19/99	6973154	01	ULTRAM 50MG TAB		TA 00045-0659-70	100.000	25	DR. BOYLE	MP	99196719220001	20.00
07/19/99	4973153	02	PROPOXY N 100MG W/APAP		TA 00093-0490-05	60.000	15	DR. BOYLE	MP	1-1209926	.00
07/25/99	6957945	05	NORVASC 10MG TAB		TA 00069-1540-68	30.000	15	DR. BOYLE	MP	1-1209928	.00
07/26/99	6957946	05	LOTENSIN 20MG TABS		TA 00083-0079-30	30.000	30	DR. DIMENNA	MP	99206726000001	20.00
									DS	99207506090001	20.00

PATIENT HISTORY

Date Range: 01/01/99 TO 02/11/05
Drug Class Range:

08/09/99	4979222	00	DARVOCET-N-100 TABS	TA	00002-0363-02	30.000	8 Dr. FEDEROWICZ	MEC	1-1245599	.00
08/15/99	4973153	03	PROPOXY N 100MG W/APAP	TA	00093-0490-05	60.000	15 Dr. BOYLE	DLH	1-1253875	.00
08/15/99	6976509	01	TRICOR 67MG	CA	00074-4342-90	60.000	30 Dr. BOYLE	DLH	99227924730001	20.00
08/21/99	4973468	02	AMBIEN 10MG TABS	TA	00025-5421-31	30.000	30 Dr. BOYLE	MP	1-1267383	.00
08/21/99	4979222	01	DARVOCET-N-100 TABS	TA	00002-0363-02	30.000	8 Dr. FEDEROWICZ	MEC	1-1265512	.00
08/21/99	6973154	02	ULTRAM 50MG TAB	TA	00045-0659-70	100.000	25 Dr. BOYLE	MEC	1-1265527	.00
08/24/99	6957945	06	NORVASC 10MG TAB	TA	00069-1540-68	30.000	30 Dr. DIMENNA	DS	99236746440001	20.00
08/30/99	4979222	02	DARVOCET-N-100 TABS	TA	00002-0363-02	30.000	8 Dr. FEDEROWICZ	MEC	1-1279032	.00
08/30/99	6957946	06	LOTENSIN 20MG TABS	TA	00083-0079-30	30.000	30 Dr. DIMENNA	MEC	99242551750001	20.00
09/09/99	4981970	00	DARVOCET-N-100 TABS	TA	00002-0363-02	60.000	15 Dr. BOYLE	DS	1-1298505	.00
09/15/99	6983592	00	TRICOR 67MG	CA	00074-4342-90	60.000	30 Dr. BOYLE	MP	99258860460001	20.00
09/21/99	4982445	00	AMBIEN 10MG TABS	TA	00025-5421-31	30.000	30 Dr. BOYLE	MEC	1-1313680	.00
09/21/99	6957945	07	NORVASC 10MG TAB	TA	00069-1540-68	30.000	30 Dr. DIMENNA	MEC	99264732980001	20.00
09/27/99	6973154	03	ULTRAM 50MG TAB	TA	00045-0659-70	100.000	25 Dr. BOYLE	MEC	1-1330612	.00
09/27/99	4981970	01	DARVOCET-N-100 TABS	TA	00002-0363-02	60.000	15 Dr. BOYLE	MEC	1-1330611	.00
10/04/99	6957946	07	LOTENSIN 20MG TABS	TA	00083-0079-30	30.000	30 Dr. DIMENNA	DLH	9272726770001	20.00
10/14/99	4981970	02	DARVOCET-N-100 TABS	TA	00002-0363-02	60.000	15 Dr. BOYLE	DS	1-1368280	.00
10/14/99	6987071	00	TRICOR 200MG CAPS	CA	00074-6415-90	30.000	30 Dr. BOYLE	DS	92872377060001	20.00
10/21/99	6957945	08	NORVASC 10MG TAB	TA	00069-1540-68	30.000	30 Dr. DIMENNA	MEC	92942165790001	20.00
10/21/99	4982445	01	AMBIEN 10MG TABS	TA	00025-5421-31	30.000	30 Dr. BOYLE	MEC	1-1384297	.00
10/30/99	4987655	00	DARVOCET-N-100 TABS	TA	00002-0363-02	120.000	30 Dr. BOYLE	DS	1-1405768	.00
10/31/99	6957946	08	LOTENSIN 20MG TABS	TA	00083-0079-30	30.000	30 Dr. DIMENNA	DS	93046855240001	20.00
11/16/99	6987656	00	ULTRAM 50MG TAB	TA	00045-0659-70	120.000	30 Dr. BOYLE	MP	1-1443562	.00
11/16/99	6987071	01	TRICOR 200MG CAPS	CA	00074-6415-90	30.000	30 Dr. BOYLE	MP	93202130680001	20.00
11/21/99	4982445	02	AMBIEN 10MG TABS	TA	00025-5421-31	30.000	30 Dr. BOYLE	DS	1-1455983	.00
11/21/99	6957945	09	NORVASC 10MG TAB	TA	00069-1540-68	30.000	30 Dr. DIMENNA	DS	93255931050001	20.00
11/24/99	6992013	00	NIZORAL CR	GM	50458-0221-30	30.000	10 Dr. BOYLE	VA	9328377500001	20.00
11/24/99	6992012	00	CELEBREX 200MG CAPS	CA	00025-1525-31	30.000	30 Dr. BOYLE	VA	1-1463931	.00
11/30/99	4987655	01	DARVOCET-N-100 TABS	TA	00002-0363-02	120.000	30 Dr. BOYLE	DS	1-1474541	.00
11/30/99	6957946	09	LOTENSIN 20MG TABS	TA	00083-0079-30	30.000	30 Dr. DIMENNA	DS	93340563120001	20.00
12/16/99	4982445	03	AMBIEN 10MG TABS	TA	00025-5421-31	30.000	30 Dr. BOYLE	DS	1-1516854	.00
12/16/99	6957945	10	NORVASC 10MG TAB	TA	00069-1540-68	30.000	30 Dr. DIMENNA	DS	93503829800001	20.00
12/28/99	6996096	00	VIOXX 25MG TAB	TA	00006-0110-68	30.000	30 Dr. BOYLE	VA	1-1551995	82.49
12/30/99	6996096	01	VIOXX 25MG TAB	TA	00006-0110-68	30.000	30 Dr. BOYLE	DS	1-1551995	.00
01/02/00	6987071	02	TRICOR 200MG CAPS	CA	00074-6415-90	30.000	30 Dr. BOYLE	MP	00033515709999	10.00
01/02/00	6957946	10	LOTENSIN 20MG TABS	TA	00083-0079-30	30.000	30 Dr. DIMENNA	MP	00033528036999	10.00
01/02/00	4987655	02	DARVOCET-N-100 TABS	TA	00002-0363-02	120.000	30 Dr. BOYLE	DS	1-1553405	.00
01/16/00	4982445	04	AMBIEN 10MG TABS	TA	00025-5421-31	30.000	30 Dr. BOYLE	RAS	1-1591004	.00
01/19/00	6957945	11	NORVASC 10MG TAB	TA	00069-1540-68	30.000	30 Dr. DIMENNA	SLB	00216377607999	10.00
01/20/00	6999222	00	NITROQUICK 0.4MG(4X25)TB	TA	58177-0324-18	25.000	5 Dr. DIMENNA	VA	00205261805999	5.00
01/27/00	6996096	02	VIOXX 25MG TAB	TA	00006-0110-68	30.000	30 Dr. BOYLE	DS	1-1620399	.00
01/27/00	6999224	00	LOTENSIN 20MG TABS	TA	00083-0079-30	30.000	30 Dr. DIMENNA	DS	00273277594999	10.00
02/01/00	6987071	03	TRICOR 200MG CAPS	CA	00074-6415-90	30.000	30 Dr. BOYLE	DS	00323440364999	10.00
02/02/00	4000843	00	DARVOCET-N-100 TABS	TA	00002-0363-02	100.000	25 Dr. BOYLE	MP	1-1638746	.00
02/16/00	4002531	00	AMBIEN 10MG TABS	TA	00025-5421-31	30.000	30 Dr. BOYLE	DS	1-1682646	.00
02/17/00	6999223	00	NORVASC 10MG TAB	TA	00069-1540-68	30.000	30 Dr. DIMENNA	DS	00494874267999	10.00
02/27/00	6996096	03	VIOXX 25MG TAB	TA	00006-0110-68	30.000	30 Dr. BOYLE	RAS	1-1704442	.00
02/27/00	6999224	01	LOTENSIN 20MG TABS	TA	00083-0079-30	30.000	30 Dr. DIMENNA	RAS	00583335001999	10.00
02/27/00	4000843	01	DARVOCET-N-100 TABS	TA	00002-0363-02	100.000	25 Dr. BOYLE	RAS	1-1704441	.00
03/07/00	6005074	00	TRICOR 200MG CAPS	CA	00074-6415-90	30.000	30 Dr. BOYLE	RAS	00676425881999	10.00
03/14/00	4002531	01	AMBIEN 10MG TABS	TA	00025-5421-31	30.000	30 Dr. BOYLE	DS	1-1749292	.00
03/21/00	6999223	01	NORVASC 10MG TAB	TA	00069-1540-68	30.000	30 Dr. DIMENNA	DS	00813049349999	10.00

PATIENT HISTORY

Date Range: 01/01/99 TO 02/11/05
Drug Class Range: TO

12/02/03	6165375	02	TRICOR 160MG TAB	TA	00074-4013-90	30.000	30 Dr. BOYLE	NG	03107040122693	20.00
12/02/03	6162058	02	VIAGRA 50MG TAB	TA	00069-4210-30	4.000	30 Dr. BOYLE	NG	03107040121790	20.00
12/02/03	6165378	02	COLESTID 1GM TABS	TA	00009-0450-03	120.000	30 Dr. BOYLE	NG	03107048070778	20.00
12/02/03	6162056	02	DARVOCET-N-100 TABS	TA	00002-0363-02	180.000	30 Dr. BOYLE	NG	1-1023416	.00
12/10/03	4171096	01	AMBIEN 10MG TABS	TA	00024-5421-31	30.000	30 Dr. BOYLE	MEC	1-1085518	.00
12/23/03	6176749	00	CIPROFLOXACIN 500MG TAB	TA	00555-0815-02	60.000	30 Dr. BOYLE	NG	03107221974542	5.00
01/01/04	6162058	03	VIAGRA 50MG TAB	TA	00069-4210-30	4.000	30 Dr. BOYLE	DS	04107296790437	20.00
01/02/04	6162056	03	TRICOR 160MG TAB	TA	00074-4013-90	30.000	30 Dr. BOYLE	DS	04107296791490	20.00
01/09/04	6165378	03	DARVOCET-N-100 TABS	TA	00002-0363-02	180.000	30 Dr. BOYLE	MP	1-1252836	.00
01/09/04	6165378	03	COLESTID 1GM TABS	TA	00009-0450-03	120.000	30 Dr. BOYLE	DS	04107365584892	20.00
02/04/04	6165375	04	AMBIEN 10MG TABS	TA	00024-5421-31	30.000	30 Dr. BOYLE	DS	1-1313195	.00
02/04/04	6165378	04	TRICOR 160MG TAB	TA	00074-4013-90	30.000	30 Dr. BOYLE	DS	04107592209098	20.00
02/04/04	6165378	04	COLESTID 1GM TABS	TA	00009-0450-03	120.000	30 Dr. BOYLE	DS	04107592211782	20.00
02/04/04	6162058	04	VIAGRA 50MG TAB	TA	00069-4210-30	4.000	30 Dr. BOYLE	DS	04107592207350	20.00
02/11/04	4171096	03	DARVOCET-N-100 TABS	TA	00002-0363-02	180.000	30 Dr. BOYLE	MP	1-1584558	.00
03/03/04	6165375	05	TRICOR 160MG TAB	TA	00024-5421-31	30.000	30 Dr. BOYLE	MP	1-1584605	.00
03/10/04	6165378	05	AMBIEN 10MG TABS	TA	00074-4013-90	30.000	30 Dr. BOYLE	NG	04107832185062	20.00
03/10/04	6165378	05	COLESTID 1GM TABS	TA	00009-0450-03	120.000	30 Dr. BOYLE	MP	1-1807390	.00
03/12/04	4186337	00	DARVOCET-N-100 TABS	TA	00002-0363-02	120.000	30 Dr. BOYLE	MP	04107893510457	20.00
03/14/04	6162058	05	TRICOR 160MG TAB	TA	00074-4013-90	30.000	30 Dr. BOYLE	NG	30000003591674	.00
04/14/04	6182807	02	VIAGRA 50MG TAB	TA	00069-4210-30	4.000	30 Dr. BOYLE	MP	04108076023725	20.00
04/14/04	6182808	00	COLESTID 1GM TABS	TA	00009-0450-03	120.000	30 Dr. BOYLE	DS	04108194830182	20.00
04/14/04	4171096	05	AMBIEN 10MG TABS	TA	00002-0363-02	120.000	30 Dr. BOYLE	DS	04108194846460	20.00
04/14/04	4186337	01	DARVOCET-N-100 TABS	TA	00024-5421-31	30.000	30 Dr. BOYLE	DS	1-2080560	.00
05/04/04	6182807	01	TRICOR 160MG TAB	TA	00074-4013-90	30.000	30 Dr. BOYLE	DS	30000003906722	.00
05/11/04	4186337	02	DARVOCET-N-100 TABS	TA	00002-0363-02	120.000	30 Dr. BOYLE	DS	04108367414825	20.00
05/19/04	4194929	00	AMBIEN 10MG TABS	TA	00024-5421-31	30.000	30 Dr. BOYLE	DS	30000004137591	.00
05/25/04	6182808	01	COLESTID 1GM TABS	TA	00009-0450-03	120.000	30 Dr. BOYLE	DS	04108429205170	20.00
06/01/04	6182807	02	TRICOR 160MG TAB	TA	00074-4013-90	30.000	30 Dr. BOYLE	DS	1-2362926	.00
07/01/04	4200271	00	AMBIEN 10MG TABS	TA	00009-0450-03	120.000	30 Dr. BOYLE	DS	04108549222220	20.00
07/01/04	6182808	02	COLESTID 1GM TABS	TA	00024-5421-31	30.000	30 Dr. BOYLE	MP	04108611389267	20.00
07/01/04	6182807	03	TRICOR 160MG TAB	TA	00009-0450-03	120.000	30 Dr. BOYLE	DS	30000004575604	.00
07/01/04	4186337	03	DARVOCET-N-100 TABS	TA	00002-0363-02	120.000	30 Dr. BOYLE	DS	04108868442093	20.00
07/27/04	6182807	04	VIAGRA 50MG TAB	TA	00074-4013-90	30.000	30 Dr. BOYLE	DS	04108868441892	20.00
08/03/04	4204051	00	AMBIEN 10MG TABS	TA	00069-4210-30	4.000	30 Dr. BOYLE	DS	30000004569525	.00
08/03/04	6182808	03	COLESTID 1GM TABS	TA	00009-0450-03	120.000	30 Dr. BOYLE	DS	04109093082975	20.00
08/03/04	4186337	04	DARVOCET-N-100 TABS	TA	00002-0363-02	120.000	30 Dr. BOYLE	DS	04109093083109	20.00
08/30/04	6182807	05	TRICOR 160MG TAB	TA	00074-4013-90	30.000	30 Dr. BOYLE	DS	30000004849982	.00
09/14/04	6182808	01	COLESTID 1GM TABS	TA	00009-0450-03	120.000	30 Dr. BOYLE	DS	04109153588351	20.00
09/14/04	4204051	01	AMBIEN 10MG TABS	TA	00024-5421-31	30.000	30 Dr. BOYLE	DS	30000004848697	.00
09/14/04	6182809	00	VIAGRA 50MG TAB	TA	00069-4210-30	4.000	20 Dr. BOYLE	DS	041093386833929	20.00
09/16/04	4209206	00	DARVOCET-N-100 TABS	TA	00002-0363-02	180.000	30 Dr. BOYLE	MP	04109516877354	20.00
09/27/04	6210694	00	TRICOR 160MG TAB	TA	00074-4013-90	30.000	30 Dr. BOYLE	NG	30000005210155	.00
10/26/04	4209206	01	DARVOCET-N-100 TABS	TA	00002-0363-02	180.000	30 Dr. BOYLE	MP	04109516879848	20.00
10/26/04	6210694	01	TRICOR 160MG TAB	TA	00074-4013-90	30.000	30 Dr. BOYLE	NG	30000005235629	.00
10/26/04	4214642	00	AMBIEN 10MG TABS	TA	00024-5421-31	30.000	30 Dr. BOYLE	DS	04109631011954	20.00
11/10/04	6182808	05	COLESTID 1GM TABS	TA	00009-0450-03	120.000	30 Dr. BOYLE	DS	30000005613739	.00
11/24/04	6218403	00	CELEBREX 200MG CAPS	CA	00025-1525-31	60.000	30 Dr. FEDEROWICZ	MP	04109879978753	20.00
11/24/04	4214642	01	AMBIEN 10MG TABS	TA	00024-5421-31	30.000	30 Dr. BOYLE	MP	30000005617617	.00
11/24/04	6210694	02	TRICOR 160MG TAB	TA	00074-4013-90	30.000	30 Dr. BOYLE	DS	04110009484332	20.00
12/07/04	4209206	02	DARVOCET-N-100 TABS	TA	00002-0363-02	180.000	30 Dr. BOYLE	DS	30000005881963	.00
								NG	04110131447495	20.00
								MP	30000005987066	.00

P A T I E N T H I S T O R Y

Date Range: 01/01/99 TO 02/11/05

Drug Class Range:

Date	Time	Drug	Strength	Quantity	Unit	Refill	Prescriber	Dispenser	Cost	
12/27/04	6222368	00	COLESTID 1GM TABS	TA	00009-0450-03	120.000	30 Dr. BOYLE	DS	04110425487089	20.00
12/30/04	6222910	00	TRICOR 145MG TABS	TA	00074-6123-90	30.000	30 Dr. BOYLE	NG	04110442483867	20.00
12/30/04	4214642	02	AMBIEN 10MG TABS	TA	00024-5421-31	30.000	30 Dr. BOYLE	NG	30000006184038	.00
01/16/05	4209206	03	DARVOCET-N-100 TABS	TA	00002-0363-02	180.000	30 Dr. BOYLE	MP	30000006346703	.00
01/30/05	6222368	01	COLESTID 1GM TABS	TA	00009-0450-03	120.000	30 Dr. BOYLE	MP	05110709985879	20.00
01/30/05	4214642	03	AMBIEN 10MG TABS	TA	00024-5421-31	30.000	30 Dr. BOYLE	MP	30000006449399	.00
01/30/05	6222910	01	TRICOR 145MG TABS	TA	00074-6123-90	30.000	30 Dr. BOYLE	MP	05110710017709	20.00
02/01/05	6218403	01	CELEBREX 200MG CAPS	CA	00025-1525-31	60.000	30 Dr. FEDEROWICZ	DS	30000006467615	.00

Total Patient Pays: \$2,034.37

I hereby certify that these drugs and medicines were dispensed to the above named person(s) by order of his (or her) personal physician.

Date: 12-Feb-05

Pharmacist Signature: _____

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SAMUELLA CADWELL and ALBERT D. CADWELL,

Plaintiffs,

-vs-

Case No. 08-Civ-3068

MERCK & CO., INC.,

Defendant.

**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S
MOTION TO STAY PENDING A DECISION ON TRANSFER BY THE
JUDICIAL PANEL ON MULTI-DISTRICT LITIGATION, AND
IN SUPPORT OF THE CROSS-MOTION PURSUANT TO 28 U.S.C. 1447(c)
TO REMAND THE INSTANT CASE TO THE NEW YORK STATE
SUPREME COURT, NEW YORK COUNTY FROM WHICH IT WAS REMOVED**

This memorandum of law is submitted in opposition to defendant Merck & Co.'s motion to stay all proceedings pending a decision by the Judicial Panel on Multi-District Litigation, and further supports plaintiffs' cross-motion to remand this action pursuant to 28 U.S.C. 1447(c) back to the New York State Supreme Court for the County of New York from which it was improperly removed by defendant Merck & Co., Inc., on the grounds of alleged fraudulent joinder. Each plaintiff respectfully submits that, because the removal to this Court is based solely on diversity jurisdiction, the cross-motion is dispositive as to the Court's lack of jurisdiction, and, therefore, it is proper to consider and grant this cross-motion despite the removing defendant's intention to seek transfer to multi-district litigation regarding its product.

STATEMENT OF FACTS

Each plaintiff was originally named in the caption of a multi-plaintiff action filed on May 11, 2005, in the Supreme Court of the State of New York for the County of New York, entitled Samuella Cadwell and Albert D. Cadwell, Wilbert E. Corprew, et ux. Carol Corprew, Elsa Plocek, et ux. Marian Plocek,

and Ronald H. Schaffer, et ux. Beverly Schaffer v. Pfizer, Inc., Pharmacia Corporation, a wholly-owned subsidiary of Pfizer, Inc., and Pharmacia & Upjohn Company, a wholly-owned subsidiary of Pharmacia Corporation, and Merck & Co., Index No. 106547/05,

as confirmed by Merck's Acknowledgment of Service. *See Exhibit A to Attorney Affirmation of Ronald R. Benjamin ("Benjamin Aff.")*. By Administrative Order dated April 14, 2006, all cases seeking damages for ingestion of Bextra, Celebrex and Vioxx, whether alone or in combination, were assigned to the Hon. Shirley W. Kornreich for the purpose of coordination for all purposes. *See Administrative Order, annexed as last document in Merck's Ex.4., at page 1*. Thereafter, plaintiffs in multi-plaintiff complaint captions were required to file separate actions, and plaintiffs commenced a separate action by filing of the complaint with the New York Supreme Court for the County of New York on August 11, 2006. *See Complaint annexed as Exhibit 1 to Notice of Removal*. As Merck appears to concede in its moving papers, it did not seek to remove the original complaint on fraudulent joinder grounds during the one-year period after it was filed, nor the separate complaint for the one-year period after it was filed.

On its face, the complaint alleges product liability and fraud claims against defendant Merck & Co., as well as Pfizer, Inc., arising out of the each plaintiff's ingestion of their respective drugs Vioxx and Celebrex. *Id., at paras. 15-16*. It is clear from the complaint that each plaintiff alleged indivisible injury based on the same personal injury risks posed by these two drugs. Defendant Merck has been provided with signed authorizations permitting it to obtain each plaintiff's pharmaceutical records, and has not supported its motion with any evidence each plaintiff did not, in fact, ingest Pfizer's drug as well as Merck's.

On the face of the original multi-plaintiff complaint and the instant complaint, it is clear each plaintiff did not sue any physician, salesman distributor or fictitious John Doe; rather, they confirm she sued only the manufacturers of the two Cox-II inhibitor drugs she ingested, one of which was

manufactured and marketed by Merck's competitor, Pfizer. The complaint alleged both the plaintiffs and defendant Pfizer are citizens of the State of New York, inasmuch as they both reside in the State of New York (*Notice of Removal, at para. 5*), and defendant's removal papers do not in any respect indicate there is any evidence that defendant Pfizer is not a citizen of New York State as alleged in the complaint at the time of filing. Instead, defendant Merck appears to concede that, absent the alleged fraudulent joinder, diversity of citizenship was not a basis for federal jurisdiction in this case at the time it was filed.

Plaintiffs turn to the facts alleged that provide the basis for the claims against Pfizer. The complaint alleges that each of the plaintiffs ingested both the drug Celebrex and the drug Vioxx. *Merck Ex. 1, Complaint, at paras. 15-16*. The ingestion of Celebrex at the 200 mg daily dose in 1999 to 2000 is documented in medical records. *See Ex. B to Benjamin Aff.*

Merck is fully aware there is ongoing nationwide litigation against the Pfizer defendants, as well as multidistrict litigation, and that on November 19, 2007, the Honorable Charles R. Breyer issued an opinion holding that the "plaintiffs have not presented scientifically reliable evidence that Celebrex causes heart attacks or strokes when ingested at the 200 milligram a day dose." IN RE: BEXTRA AND CELEBREX MARKETING SALES PRACTICES AND PRODUCT LIABILITY LITIGATION (MDL No. 1699), 524 F. Supp. 2d 1166, 1169, 2007 U.S. Dist. LEXIS 85382 at *40 (N.D.CA 2007).

Judge Breyer's order came within days after the Compliance Motion Order entered by Special Master Fern M. Smith, which required expedited compliance with discovery requirements of Case Management Order No. 6 within 21 days. *See Merck's Ex. 4 annexed to the Notice of Removal*. However, Judge Breyer's decision intervened and clearly impacted the viability of the each plaintiff's claims based on her ingestion of Celebrex. Indeed, thereafter, Pfizer filed a motion for failure to comply with Judge Smith's expedited order. On February 25, 2008, counsel for plaintiffs filed a

cross-motion for an extension of time based on the fact that "Judge Breyer's decision and the overlapping events...have clearly raised significant issues as to the likelihood of success of each of the plaintiff's claims [based on Celebrex]" which required him to evaluate the individual claims and identify claims that should be discontinued and advise the plaintiffs of the same. *See Ex. C to Benjamin Aff., Attorney Affirmation, at paras. 6-7.* Thereafter, on March 5, 2008, plaintiff's counsel signed the Stipulation of Dismissal with Prejudice Against Pfizer Defendants. *See Ex. 2 to Notice of Remand.*

ARGUMENT

The Removing Defendant Has Failed to Meet its Burden to Show Entitlement to Removal Based on the Matters Alleged with Regard to Purported Fraudulent Joinder With Respect to the Claims Against Pfizer Within the First Year After the Complaint Was Filed, And Is Not Entitled to a Stay and Granting the Cross-Motion to Remand Would Properly Divest the Federal Courts of Jurisdiction to Transfer to the MDL.

Defendant Merck concedes its notice of removal does not meet the time limitations in the rules, and seeks to place the blame for the same on the plaintiffs. In this case, removal has occurred almost three years after the complaint was filed. In response, plaintiffs respectfully submit that, as the removing party, defendant Merck has "the burden of establishing that Pfizer is a nominal party and any doubts are to be resolved in favor of remand", since its notice of removal is tantamount to a claim that Pfizer was "joined for the sole purpose of destroying diversity." Marun Fashion and Sportswear, Inc., v. The Gillman Knitwear Co., 1992 U.S. Dist. LEXIS 6298, at *1-2 (SDNY May 4, 1992). Indeed, it is respectfully submitted the law is well settled that:

"Removal statutes are construed narrowly and all uncertainties are resolved in favor of remand in order to promote the goals of federalism, restrict federal court jurisdiction, and support the plaintiff's right to choose the forum." *Curtin v. Port Auth. of New York*, 183 F. Supp. 2d 664, 667 (S.D.N.Y. 2002); accord *Somlyo v. J. Lu-Rob Enter., Inc.*, 932 F.2d

*1043, 1045-46 (2d Cir. 1991); Stamm v. Barclays Bank, 1996 U.S. Dist. LEXIS 15781, No. 96 Civ. 5158 (SAS), 1996 WL 614087, at *1 (S.D.N.Y. Oct. 24, 1996); see Gilman v. BHC Sec., Inc., 104 F.3d 1418, 1428 (2d Cir. 1997). The removing party has the burden of demonstrating that federal jurisdiction exists. Grimo v. Blue Cross/Blue Shield, 34 F.3d 148, 151 (2d Cir. 1994); Curtin, 183 F. Supp. 2d at 667.*

Rubin v. Mastercard International, LLC, 2004 U.S. Dist. LEXIS 20528, at *3 (SDNY Oct. 14, 2004).

Removing defendant Merck has failed to demonstrate that each plaintiff has not pled a cause of action against Pfizer. Merck, as the removing defendant, has not adduced any facts showing the medical literature raised no concerns as to the cardiovascular risks of Vioxx and Celebrex prior to each plaintiff's ingestion thereof. The safety and risks of Vioxx and Celebrex, which are selective cyclooxygenase 2 (COX-2) inhibitors, has been a matter of debate and ongoing study throughout the instant litigation. This is clearly confirmed by Judge Breyer's *Daubert* decision issued November 19, 2007.

In this case, the reason that Pfizer was stipulated out of the case was the ruling on expert testimony concerning 200 mg dose of Celebrex. Plaintiffs' complaint against Pfizer and Merck has been pending for almost three years, which, each plaintiff submits, supports remand in that more than a full year passed after plaintiffs filed the action.¹ The length of time these product liability claims have been pending evinces there was no fraudulent joinder or tactical avoidance despite the evolution of the litigation and the later events caused by Judge Breyer's decision.

Finally, plaintiffs respectfully submit this Court should grant the instant motion for remand particularly in light of the possible transfer to the Vioxx MDL No. 1657 as suggested by defendant Merck in its motion, since "judicial efficiency and economy are better served by this Court considering, *before the case is transferred to the MDL Court*, the Motion to Remand." Barragan v. Warner-

¹*/Because these plaintiffs were the first plaintiffs named in the caption of the complaint, they retained the index number for that action, and, unlike the other plaintiffs in the caption, did not file a separate and second action since the same was unnecessary.

Lambert Co., 216 F.Supp.2d 627,630, 2002 U.S.Dist. LEXIS 16443, at *5 (WD Tex. 2002) [emphasis added]. "This Court, as transferor Court, retains exclusive jurisdiction until the § 1407 transfer becomes effective and as such, motions to remand should be resolved before the panel acts on the motion to transfer." *Tortola Restaurants, L.P. v. Kimberly-Clark Corp.*, 987 F. Supp. 1186, 1189 (N.D. Cal. 1997).

There is a clear indication in the Judicial Panel's Rules of Procedure that:

... the pendency of a motion, order to show cause, conditional transfer order or conditional remand order before the Panel concerning transfer or remand of an action pursuant to 28 U.S.C. §1407 does not affect or suspend orders and pretrial proceedings in the district court in which the action is pending and does not in any way limit the pretrial jurisdiction of that court.

R. P. JPML 1.5 (2001). Moreover:


When notified of the filing of a motion for transfer, therefore, matters such as motions to dismiss or to remand, raising issues unique to the particular case, may be particularly appropriate for resolution before the Panel acts on the motion to transfer. The Panel has sometimes delayed ruling on transfer to permit the court in which the case is pending to decide critical, fully briefed and argued motions.

Manual for Complex Litigation, § 20.132, at 220-221 (4th Ed.) (emphasis added).

CONCLUSION

In view of the aforesaid matters, it is respectfully requested that the defendant's motion for a stay of these proceeding should be DENIED, and plaintiff's cross-motion to remand this action to the New York State Court in New York should be GRANTED.

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